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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052575
Party	Defendant Combat Medical Systems, LLC
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Filer's Name	csorey@wyrick.com
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Signature	/CLS/
Date	09/30/2010
Attachments	answeramendedopp.pdf ( 18 pages )(2096145 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

DONALD MLYNEK	)	
(AN INDIVIDUAL),	)	
	)	
Opposer/Plaintiff,	)	
	)	
v.	)	Opposition No. 91/195308
	)	Cancellation No. 92/052575
COMBAT MEDICAL SYSTEMS, LLC	)	
	)	
Applicant/Respondent.	)	

**APPLICANT'S ANSWER TO THE AMENDED NOTICE OF OPPOSITION;**  
**REGISTRANT'S ANSWER TO THE AMENDED PETITION TO CANCEL; AND**  
**APPLICANT'S REASSERTION OF THE COUNTERCLAIM TO CANCEL**  
**OPPOSER'S PLEADED REGISTRATION**  
**NO. 3780231**

The Applicant, Combat Medical Systems, LLC, by and through undersigned counsel, hereby serves its Answer to the Amended Opposition filed by Donald Mlynek. Likewise Combat Medical Systems as Registrant of US Registration 3805112 hereby serves its Answer to the Amended Petition to Cancel.

**APPLICANT'S ANSWER TO OPPOSER'S AMENDED NOTICE OF OPPOSITION**

The Applicant, Combat Medical Systems, LLC, by and through undersigned counsel, hereby serves its Answer to the Amended Opposition filed by Donald Mlynek as follows:

1. Answering Paragraph 1 of the Amended Opposition, Applicant denies the allegations contained therein insofar as it refer's to Applicant's mark as "COMBAT MEDICAL SYSTEMS LLC." Applicant's application Serial No. 77/931,466 seeks registration of the mark

COMBAT MEDICAL SYSTEMS and Design. The term “LLC” is not a component of the mark. Please see Exhibit 1 attached.

2. Answering Paragraph 2 of the Amended Opposition, Applicant, Combat Medical Systems, LLC has insufficient knowledge or information to form a belief as to the truth of the allegations contained therein, and the same are denied.

3. Answering Paragraph 3 of the Amended Opposition, Applicant Combat Medical Systems, LLC has insufficient knowledge or information to form a belief as to the truth of the allegations contained therein, and the same are denied.

4. Answering Paragraph 4 of the Amended Opposition, Applicant admits the allegation insofar as it pertains to the ownership of U.S. Registration No. 3780231 for the mark COMBAT MEDICAL LLC, but Applicant denies Opposer’s erroneous claim that the mark, having only issued on April 27, 2010 and having alleged April 1, 2008 as its approximate date of first use in commerce, is incontestable under Section 15 of the U.S. Trademark Act, 15, U.S.C. 1065. Except as expressly admitted herein, Applicant denies the allegations of Paragraph 4 of the Amended Opposition.

5. Answering Paragraph 5 of the Amended Opposition, Applicant denies the allegations contained therein.

6. Answering Paragraph 6 of the Amended Opposition, Applicant denies the allegations contained therein.

7. Answering Paragraph 7 of the Amended Opposition, Applicant denies the allegations contained therein.

8. Answering Paragraph 8 of the Amended Opposition, Applicant denies the allegations contained therein.

**REGISTRANT'S ANSWER TO PETITIONER'S AMENDED PETITION FOR  
CANCELLATION**

The Registrant, Combat Medical Systems, LLC, by and through undersigned counsel, hereby serves its Answer to the Amended Petition for Cancellation filed by Plaintiff, Donald Mlynek, as follows:

1. Answering Paragraph 1 of the Cancellation, Registrant denies the allegations contained therein insofar as it refers to the mark as "COMBAT MEDICAL SYSTEMS, LLC." Registrant, however, is listed as the Registrant of US Registration No. 3,805,112 for the mark COMBAT MEDICAL SYSTEMS covering online mail order catalog services and online retail store service, both featuring a wide variety of combat casualty care medical goods, supplies, and equipment. The term "LLC" is not a component of the mark. Please see Exhibit 2 attached. Except as expressly admitted herein, Registrant denies the allegations of Paragraph 1 of the Cancellation.

2. Answering Paragraph 2 of the Cancellation, Registrant, Combat Medical Systems, LLC, has insufficient knowledge or information to form a belief as to the truth of the allegations contained therein and the same are there denied.

3. Answering Paragraph 3 of the Cancellation, Registrant, Combat Medical Systems, LLC, has insufficient knowledge or information to form a belief as to the truth of the allegations contained therein and the same are there denied.

4. Answering Paragraph 4 of the Cancellation, Registrant admits the allegation insofar as it pertains to the listing of Donald Mlynek as registrant and owner of U.S. Registration No. 3,780,231. However, Registrant denies Plaintiff's claim of use of the mark contained in US Registration No. 3,780,231 as Registrant lacks sufficient information or belief that Plaintiff uses

the mark as anticipated and defined by the Lanham Act. Except as expressly admitted herein, Registrant denies the allegations of Paragraph 4 of the Cancellation.

5. Answering Paragraph 5 of the Cancellation, Applicant denies the allegation in its entirety.

6. Answering Paragraph 6 of the Cancellation, Applicant denies the allegation in its entirety.

7. Answering Paragraph 7 of the Cancellation, Applicant denies the allegation in its entirety.

8. Answering Paragraph 8 of the Cancellation, Registrant denies the allegation insofar as it refers to Registrant's mark as "COMBAT MEDICAL SYSTEMS LLC." As discussed above, Registrant's mark is COMBAT MEDICAL SYSTEMS. The term "LLC" is not a component of Registrant's mark.

**COUNTERCLAIM FOR CANCELLATION OF THE OPPOSER'S PLEADED  
REGISTRATION NO. 3780231**

The Applicant/Registrant, Combat Medical Systems, LLC, by and through undersigned counsel, hereby reasserts its counterclaim to cancel the pleaded Registration No. 3,780,231 for the trademark COMBAT MEDICAL LLC and Design issued to Mr. Donald Mlynek on the Principal Register on April 27, 2010 for "*medical bags sold empty*" in International Class 10 (the "Registration"). As grounds for cancellation, it is alleged that: i) Donald Mlynek is not using the mark in commerce in connection with the goods listed in the Registration; ii) Donald Mlynek by and through his attorney, Kenneth Lynch, knowingly committed fraud on the U.S. Patent & Trademark Office by declaring that the mark was in use on the goods at the time the application was filed.

### **Facts Common to All Grounds**

1. Applicant/Registrant, Combat Medical Systems, LLC is now, and for several years has been, engaged in the marketing, sales, promotion, development and/or distribution of a wide variety of medical devices and apparatus used in combat by military personnel and used in law enforcement activities.

2. Combat Medical Systems, LLC is the proprietor of: (i) Application Serial No. 77/931,466 for the mark COMBAT MEDICAL SYSTEMS and Design for “*online mail order catalog services and online retail store services both featuring a wide variety of combat casualty care medical goods, supplies, and equipment*” in International Class 35, filed on February 9, 2010 in the U. S. Patent & Trademark Office under Section 1(a) of the Trademark Act,; and (ii) Registration No. 3,805,122 for the mark COMBAT MEDICAL SYSTEMS for “*online mail order catalog services and online retail store services both featuring a wide variety of combat casualty care medical goods, supplies, and equipment*” in International Class 35, filed on February 9, 2010 and registered on the Supplemental Register on June 15, 2010.

3. Donald Mlynek, by and through his attorney, Mr. Kenneth Lynch, filed a Notice of Opposition against Combat Medical Systems, LLC’s Application Serial No. 77/931/466 on June 16, 2010.

4. Donald Mlynek, by and through his attorney, Mr. Kenneth Lynch, filed a Petition to Cancel Combat Medical Systems, LLC’s U.S. Registration No. 3,805,122 on June 16, 2010.

5. Donald Mlynek is the listed registrant of U.S. Registration No. 3,780,231 for the mark COMBAT MEDICAL LLC and Design covering medical bags sold empty in Class 10.

6. On April 1, 2009, Donald Mlynek filed application 77/704,258 for the mark COMBAT MEDICAL LLC and Design claiming use in commerce as a basis for registration

under Section 1(a) of the Trademark Act. This application registered as U.S. Registration No. 3,780,231.

7. In U.S. Registration No. 3,780,231, Donald Mlynek disclaimed without objection any exclusive right to the terms "COMBAT MEDICAL LLC" apart from the full composite mark including the design element.

8. As a specimen showing use, Donald Mlynek, by and through his attorney, submitted a digital copy of the website showing the mark allegedly used in connection with the goods.

9. The description of the design elements for the pleaded Registration reads: "The color(s) red, white, blue, black, green is/are claimed as a feature of the mark. The mark consists of a black globe with green land masses. The globe is encircled by three concentric rings that are colored red, white and blue. The wording "COMBAT MEDICAL" is offset to the left and tilted under the globe. The letters "LLC" are placed to the lower right side of the "L" in "MEDICAL". All wording is in green outlined in white. The entire mark *is within a black square.*" U.S. Registration No. 3,780,231 (emphasis added).

10. The mark as it appears on the specimen submitted by Donald Mlynek does not appear entirely within a black square, as stipulated in the design description, and is not a substantially exact presentation of the drawing submitted with the application. Therefore, the drawing page of the application disagrees with the mark as it appears on the specimen, contrary to the requirements set forth in 37 C.F.R. §2.51; TMEP §§807.12-12(a).

**Mark Not in Use**

11. Combat Medical Systems, LLC incorporates the previous paragraphs as if alleged herein.

12. In Application Serial No. 77/704258, Donald Mlynek represented and declared that the COMBAT MEDICAL LLC mark was in use in commerce on or in connection with medical bags sold empty in Class 10 under penalty of perjury as set forth in 18 U.S.C. Section 1001.

13. Upon information and belief, and after some investigation by Combat Medical Systems, LLC, it is alleged that Donald Mlynek is not using the COMBAT MEDICAL LLC mark on the goods listed in U.S. Registration No. 3,780,231 in interstate commerce.

14. Donald Mlynek's website, located at [www.combatmedical.com](http://www.combatmedical.com), does not show any use of the COMBAT MEDICAL LLC mark in connection medical bags sold empty and merely shows the COMBAT MEDICAL LLC term being used in a manner associated with trade name usage and not technical use as a trademark. Please see Exhibit 3.

15. Upon information and belief, and after some investigation, Combat Medical Systems, LLC alleges that Donald Mlynek is not using the COMBAT MEDICAL LLC mark in connection with medical bags sold empty as described in the pleaded registration, U.S. Registration No. 3,780,231.

**Fraud**

16. Combat Medical Systems, LLC incorporates the previous paragraphs as if alleged herein.

17. Donald Mlynek, by and through his attorney, declared that the mark had been in use in connection with the goods since at least as early as April 1, 2008.

18. Upon information and belief, and an investigation by Combat Medical Systems, LLC, it is alleged that the COMBAT MEDICAL LLC and Design mark that is the subject of the



pleaded Registration was not, at the time the application was filed, in use in connection with the goods listed in the application or the issued registration.

19. Upon information and belief, and an investigation by Combat Medical Systems, LLC, Petition alleges that Donald Mlynek, by and through his attorney Kenneth Lynch, made false, material misrepresentations of fact in procuring the Registration. Specifically, Donald Mlynek or his attorney knew that the COMBAT MEDICAL LLC mark was not in use in connection with the goods referenced in the application at the time the application was filed.

20. Upon information and belief, and an investigation by Combat Medical Systems, LLC, the mark COMBAT MEDICAL, LLC has not been used as an indication of source for medical bags sold empty by Donald Mylnak on, before or anytime after April 1, 2008.

21. Upon information and belief, and an investigation by Combat Medical Systems, LLC, the mark COMBAT MEDICAL LLC has never been used by Donald Mlynek as a trademark.

22. Based on the aforementioned acts, Donald Mlynek, by and through his attorney, Mr. Kenneth Lynch, intentionally acted to deceived the U.S. Patent & Trademark Office in order to procure registration of COMBAT MEDCIAL, LLC.

WHEREFORE, having fully responded to the allegations of the Opposition and Cancellation as amended, the Applicant requests that the Opposition and Cancellation be dismissed, and that a Certificate of Registration for COMBAT MEDICAL SYSTEMS be issued in due course. Applicant further prays that the counterclaim for cancellation be granted with Reg. No. 3,780,231 being ordered canceled

Respectfully submitted, this the 30<sup>th</sup> day of September, 2010.

WYRICK ROBBINS YATES & PONTON LLP

By: 

R. Anthony Young

NC State Bar No. 39288

Christopher L. Sorey

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 30<sup>th</sup>, 2010 a true and correct copy of the foregoing APPLICANT'S ANSWER TO THE AMENDED NOTICE OF OPPOSITION; REGISTRANT'S ANSWER TO THE AMENDED PETITION TO CANCEL; AND APPLICANT'S REASSERTION OF THE COUNTERCLAIM TO CANCEL OPPOSER'S PLEADED REGISTRATION NO. 3780231 was electronically filed with the TTAB via the ESTTA Filing System with the same served upon counsel of record for Opposer by U.S. Mail, postage prepaid and via email, addressed as follows:

Kenneth Lynch  
6994 El Camino Real, #204  
Carlsbad, CA 92009  
lynchlaw@roadrunner.com

*Counsel for Opposer*  
DONALD MLYNEK (AN INDIVIDUAL)

  
\_\_\_\_\_  
Christopher L. Sorey  
Wyrick Robbins Yates & Ponton, LLP

# Exhibit 1



United States Patent and Trademark Office

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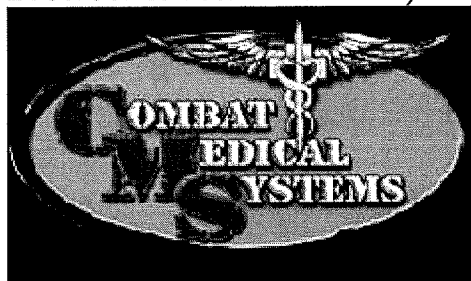
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<b>Word Mark</b>	COMBAT MEDICAL SYSTEMS
<b>Goods and Services</b>	IC 035. US 100 101 102. G & S: online mail order catalog services and online retail store service both featuring a wide variety of combat casualty care medical goods, supplies, and equipment. FIRST USE: 20080301. FIRST USE IN COMMERCE: 20080527
<b>Mark Drawing Code</b>	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
<b>Design Search Code</b>	03.21.01 - Caduceus; Serpent and staff (caduceus) 25.03.25 - Backgrounds covered with other figurative elements or repetitive designs, words or letters; Repetitive designs, words, or letters as a background 26.03.02 - Ovals, plain single line; Plain single line ovals
<b>Serial Number</b>	77931466
<b>Filing Date</b>	February 9, 2010
<b>Current Filing Basis</b>	1A
<b>Original Filing Basis</b>	1A
<b>Published for Opposition</b>	June 15, 2010
<b>Owner</b>	(APPLICANT) Combat Medical Systems, LLC LIMITED LIABILITY COMPANY NORTH CAROLINA 6441 Yadkin Road Fayetteville NORTH CAROLINA 28303
<b>Attorney of Record</b>	Christopher L. Sorey
<b>Disclaimer</b>	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "COMBAT MEDICAL SYSTEMS" AND

**Description of Mark** THE REPRESENTATION OF THE CADUCEUS SYMBOL APART FROM THE MARK AS SHOWN  
Color is not claimed as a feature of the mark. The mark consists of the stenciled letters "CMS" forming the wording "COMBAT MEDICAL SYSTEMS" and a design element comprised of a cross and the caduceus symbol all surrounded in an oval shape.

**Type of Mark** SERVICE MARK

**Register** PRINCIPAL

**Live/Dead Indicator** LIVE

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## Exhibit 2

# United States of America

United States Patent and Trademark Office

## COMBAT MEDICAL SYSTEMS

**Reg. No. 3,805,112**

**Registered June 15, 2010**

**Int. Cl.: 35**

**SERVICE MARK**

**SUPPLEMENTAL REGISTER**

COMBAT MEDICAL SYSTEMS, LLC (NORTH CAROLINA LIMITED LIABILITY COMPANY)  
6441 YADKIN ROAD  
FAYETTEVILLE, NC 28303

FOR: ONLINE MAIL ORDER CATALOG SERVICES AND ONLINE RETAIL STORE SERVICE  
BOTH FEATURING A WIDE VARIETY OF COMBAT CASUALTY CARE MEDICAL GOODS,  
SUPPLIES, AND EQUIPMENT, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 3-1-2008; IN COMMERCE 5-27-2008.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "MEDICAL SYSTEMS", APART FROM THE MARK AS SHOWN.

SER. NO. 77-931,446, FILED P.R. 2-9-2010; AM. S.R. 2-9-2010.

JENNY PARK, EXAMINING ATTORNEY

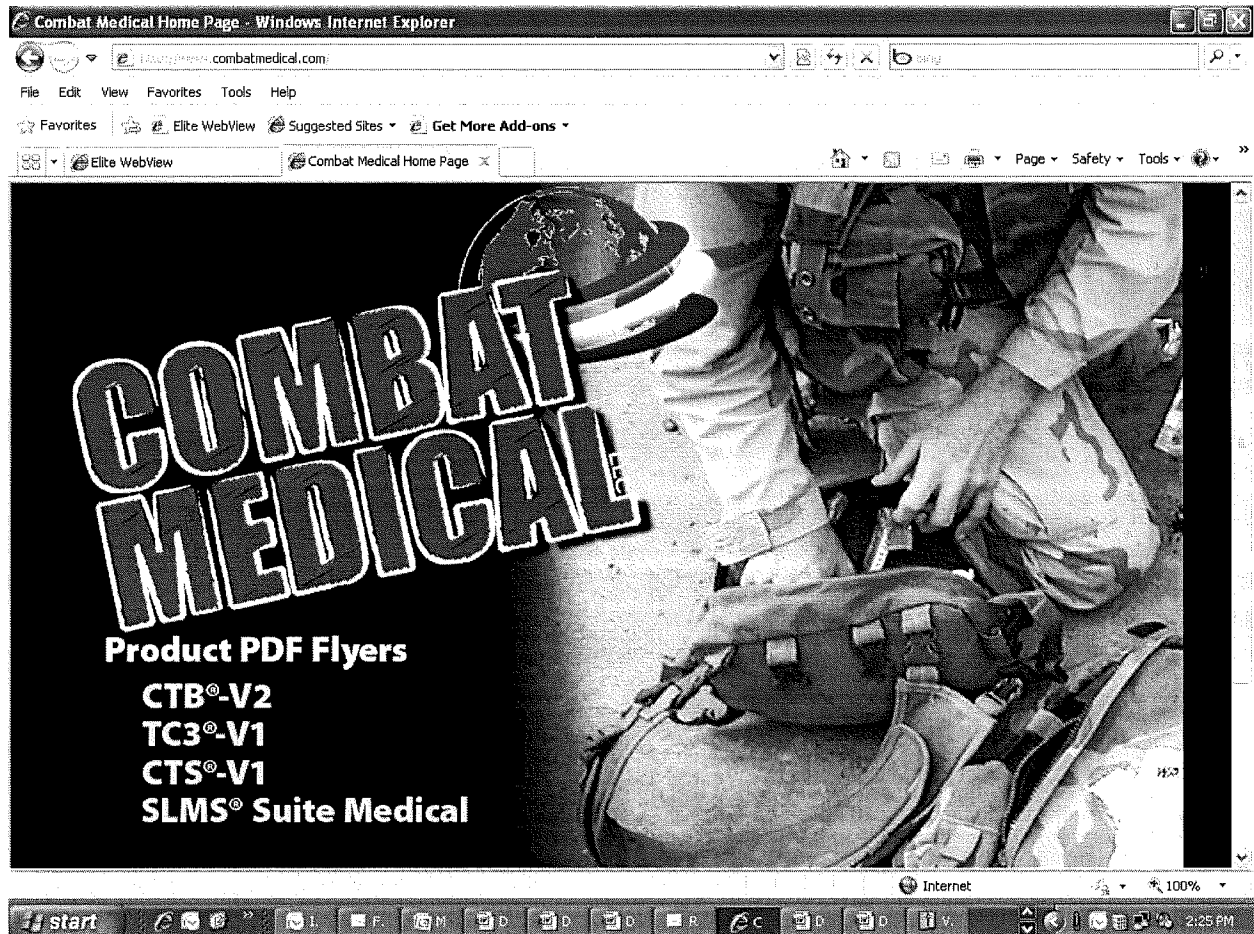


*David J. Kybas*

Director of the United States Patent and Trademark Office



## Exhibit 3



Combat Medical Home Page - Windows Internet Explorer

http://www.combatmedical.com

File Edit View Favorites Tools Help

Favorites Elite WebView Suggested Sites Get More Add-ons

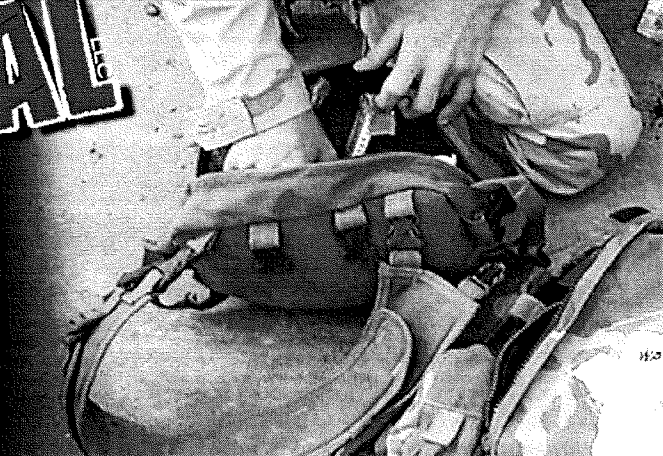
Elite WebView Combat Medical Home Page

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